Supreme Court, U.S.
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No. 08-217

In the Supreme Court of the United States

CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON,
Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Brooke County, West Virginia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Seldom does a brief in opposition better prove the need for review than does the one in this case. As we discuss below, respondents rebut none of the propositions underlying our contention that the lower courts need further guidance on the circumstances in which massive punitive damages awards are sustainable. Moreover, their Counter-Statement of Facts serves only to confirm that the conduct in this case barely registers on the reprehensibility scale and surely is insufficiently egregious to support a $100 million exaction.[1]

REPLY STATEMENT OF FACTS

Respondents' Counter-Statement of Facts demonstrates the marginal culpability of Massey's alleged misconduct. Despite asserting that Massey made "[m]any" statements that "were blatantly false" (Opp. 5), respondents fail to identify a single misrepresentation that Massey actually made. Respondents point to company-wide trends and statistics that allegedly contradict Massey's *force majeure* notices—but they gloss over the fact that the notices did not address those macro-level issues. Instead, the *force majeure* letters referred to specific problems with specific coal shipments. Respondents do not, because they cannot, assert that Massey invented, or even overstated, those specific problems.[2] Indeed,

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[1] Petitioners' previous Rule 29.6 Statement remains accurate, except that as of September 30, 2008, no publicly-held company owns 10% or more of Massey's stock.

[2] Respondents also state, incorrectly, that "the jury found that petitioners made a series of misrepresentations." Opp. 3. In fact, the jury was asked only whether Massey "made *one or more* misrepresentations *or* withheld infor-

their own executives and expert witnesses conceded that virtually all of the specific events described in the notices in fact occurred. See Pet. 6-7.

For instance, respondents allege that Massey represented that it "experienced catastrophic railcar shortages in 2004 and 2005," and they contrast that statement with the fact that "Massey received more railcars in 2004 and 2005 than the previous years." Opp. 5-6. But the *force majeure* notices in question said only that Massey had received fewer railcars than requested on specific routes in specific months and that individual trains were delayed. Pet. 6; *e.g.*, Pl. Ex. 165B at 5, 7, 10, 11. Respondents offered no evidence at trial that those statements were false. Similarly, respondents contrast Massey's purported statement that it "experienced severe labor shortages" with evidence that the company "employed more workers in 2004 than 2003, and then even more workers in 2005." Opp. 6. But the relevant *force majeure* notices all mentioned *particular* job vacancies or mines—shortages that were never disputed at trial. *E.g.*, Pl. Ex. 165 B at 6, 13.

Finally, respondents contend that "Petitioners falsely represented that Massey experienced unforeseen mining conditions that decreased its production." Opp. 6. Though there is dispute around the margins as to the precise effect of certain such conditions and the meaning of particular words in the *force majeure* notices, respondents' expert admitted that most of these events occurred and affected production. See Tr. 2335, 2344, 2350, 2355-56, 2357-58, 2359-60, 2363-64, 2365, 2367-68, 2371, 2377.

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mation related to or concerning a material fact." Tr. 5566 (emphasis added).

Respondents' other allegations—even taken at face value—are hardly the type of conduct that warrants a nine-figure punitive award. Respondents claim that Massey did not keep extra-contractual, oral promises to conduct "diligent remedial efforts" against the supply interruptions. Opp. 6. They contend that Massey's open-market purchases of coal—which were not required by the contract—declined in 2004. *Id.* at 7. And they repeat the claim that Massey somehow concealed its sales to other customers. *Ibid.* Even assuming that West Virginia law requires suppliers to disclose publicly all new contracts, respondents admit that they read about the new sales in trade publications. *Ibid.*; see also Tr. 600-01. None of these allegations justifies the gargantuan punitive award.

ARGUMENT

Respondents do not deny that due process compels reviewing courts to consider whether the amount of punitive damages imposed by the jury is greater than reasonably necessary to punish and deter. They do not deny that the West Virginia courts conducted no such inquiry here. And they do not deny that the failure to do so in this case is illustrative of a pervasive problem.[3] They instead argue that review is unwarranted principally because the Circuit Court made 32 findings of facts and conclusions of law.

But those findings do not explain why a $100 million exaction that far exceeds any penalty that would or could be imposed through the criminal

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[3] For a discussion of the recurring nature of the problem, see Brief for Amicus Curiae The American Chemistry Council in Support of Petitioners at 10 & n.4.

process or by an expert regulator *for more heinous conduct* is necessary, or why "a lesser deterrent" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 584 (1996)) would not suffice to satisfy West Virginia's punitory interests. In particular, although one of the findings acknowledges that the compensatory damages exceed the profits from the alleged misconduct, there is no analysis whatever as to why a further award of $100 million in punitive damages is necessary in such circumstances.[4]

Moreover, although the findings label Massey's conduct "reprehensible," nowhere do they explain why that conduct was so reprehensible as to necessitate a nine-figure punishment. Contrary to respondents' assertion (Opp. 35), the Circuit Court did not "provide[] a reasoned explanation for its conclusion that petitioners' conduct was so reprehensible that it justified the punitive damage awards." Rather, it simply described the conduct found by the jury to be fraudulent (and characterized as sinister actions that almost anyone else would deem to be good faith). See Pet. 8 & n.4. The court made no attempt to place the conduct on a spectrum of reprehensibility, much less to explain why it warranted a penalty that is tens of millions of dollars greater than the punitive awards found by other courts to be the constitutional maximum for conduct that is undeniably more egregious.

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[4] Respondents suggest that this case involves two $50 million punitive awards, rather than a single $100 million exaction. See Opp. 36 n.11. Given that the two awards were imposed against members of the same corporate family for a single course of conduct, that is a quibble that should make no difference.

New statistics from the Department of Justice confirm that this case is symptomatic of a broader problem: Juries award punitive damages more often, in larger dollar amounts, and at higher ratios in ***contract-related cases*** than in pure tort cases. See Bureau of Justice Statistics, *Civil Bench and Jury Trials in State Courts, 2005*, at 6 t.7, 7 t.8 (October 2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf. Without judicial review far more searching than was provided in this case, the severity of punishment will continue to bear little connection to the reprehensibility of the defendant's conduct.

Finally, respondents assert that we "do not set forth the nature of the guidance" we seek from this Court. Opp. 36. Not so. As we explained in the petition (at 13), "[r]eview is urgently needed to remind the lower courts that the guideposts are meant to assist in determining whether the *absolute* amount of a punitive award is excessive in relation to the State's interests in retribution and deterrence." In particular, this Court's intervention is needed "to make clear to lower courts that * * * perfunctorily labeling the conduct 'reprehensible' and observing that the ratio of punitive to compensatory damages is low is not enough to justify an eight-, nine-, or ten-digit punitive award." *Id.* at 3; see also *Amici Curiae* Brief of American Tort Reform Association, Chamber of Commerce of the United States of America, West Virginia Chamber of Commerce, and American Gas Association in Support of Petitioners at 8-15.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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